". . . . . It seems to us that the intention of the Legislature is clear in both statutes. The intention was that leases should not be made except by deed.

. . . . . .

It seems to us, therefore, that the party entering into possession under such an instrument is in the same position as that in which he would have been before the Acts. He has not a lease, nor a tenancy for the three years and a week; but a tenancy from year to year, which, during that time, is determinable by half a year's notice. If he stays to the end of the time, then, by the agreement of both parties he goes out without notice."

The same result would have followed in the present case if the rent payable under the agreement had been an annual rent. In my judgment the decision in *Tress v. Savage, supra,* is not inconsistent with the decision in cases supporting the learned trial judge's conclusion.

Before us the appellant raised two grounds of appeal. First, that the learned trial judge has placed too much reliance on the manner of payment of rent in deciding whether a yearly tenancy had been created but has not considered other factors such as the conduct and intention of the parties concerned prior to the execution of the lease, the long period of the lease, the nature of business carried on within and in particular the fact that the parties were not represented by counsel in this preparation of the lease. Secondly, the appellant complained that the learned trial judge has not examined the relevant documents or given the appellant the opportunity to be heard so as to form an opinion as to the other considerations surrounding the said tenancy.

The answer to the first ground of appeal is that so far as the main question before the trial court was concerned with the validity or otherwise of the notice to quit it was clearly a question of law which fell to be decided in accordance with established legal principles acceptable to the courts in this country. The manner of payment of rent has always been the basis of consideration in the formulation of the principle stated in the English cases which, undoubtedly led the learned trial judge to come to the conclusion as he did in this case. If the trial court had any discretion in the matter, there might be ground for saying that the factors referred to by the appellant would be relevant for consideration. But this is not a case in which the court has to exercise a discretionary power but to construe the effect of the relevant term of the written agreement. The appellant's contention is not well founded and should be rejected.

The second ground of appeal can be disposed of in a few words. Apart from the tenancy agreement which was considered by the learned trial judge I cannot find any other which could be said to be relevant to support the appellant's legal contention that he was holding a yearly tenancy. As to the complaint that she was not given an opportunity to be heard, I shall be content to say that the appellant is bound by the agreement of her counsel to abide by the decision in Civil Suit No. 53 of 1966.

In my opinion this appeal should be dismissed with costs here and below.

Appeal dismissed.

Solicitors: *M. Abraham & Co.; Lovelace & Hastings.*

LOH KHENG MEAH & ORS. v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) July 28, 1969]

[Kuala Lumpur—Federal Court Criminal Appeal No. X.12 of 1969]

Criminal Law and Procedure — Trial — Trial before judge with aid of assessors — Failure to record reasons given by assessors for their opinions — Not mere irregularity — Failure of justice — Kidnapping Act, 1961, s. 3(1) — Criminal Procedure Code (Cap. 21), ss. 197, 198 & 422.

This was an appeal against conviction for an offence contrary to section 3(1) of the Kidnapping Act, 1961. The accused were tried by a judge with the aid of assessors. At the end of the summing up the learned trial judge asked each assessor for his opinion on a number of questions and each of the assessors gave his answers to these questions. The learned trial judge agreed with their opinions and accordingly convicted the 1st and 3rd appellants and sentenced them to death. On appeal it was argued, *inter alia,* that the learned trial judge should have ascertained from each assessor the reasons for his opinion, that these reasons should be recorded and that the admitted failure of the learned trial judge to do so vitiated the trial.

Held: the reasons given by the assessors might have influenced the learned judge's judgment and the omission by the learned judge to ascertain the reasons for the opinion of the assessors had occasioned a failure of justice within the meaning of section 422 of the Criminal Procedure Code.

Cases referred to:—

(1) *Ramanugrah Singh* v. *King-Emperor* 73 I.A. 174.

(2) *Abdul Rahman* v. *King-Emperor* 54 I.A. 96.

(3) *Subramania Iyer* v. *King-Emperor* 28 I.A. 257.

(4) *Lal Behari Singh & Ors.* v. *Emperor* A.I.R. 1934 Oudh 354.

(5) *Prem Nath* v. *State of Delhi* A.I.R. 1956 S.C. 4.

FEDERAL COURT.

Dato' S.P. Seenivasagam (*R. Rajasingham* with him) for the 1st appellant.

Tan Phock Kin for the 3rd appellant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Azmi L.P.: The first and third appellants were charged with abducting Lim Pee Hong

with intent to hold him for ransom contrary to section 3(1) of the Kidnapping Act No. 41 of 1961. The trial was conducted in the High Court at Penang by a judge with the aid of two assessors as required by sub-section (3) of section 3 of the Act.

At the end of the summing-up the learned judge asked each assessor for his opinion on eight questions. These questions were recorded and no objection was taken to their form.

Each assessor gave his answers to these questions. They were all in the affirmative and they were all recorded. The effect of the opinion so expressed by each assessor was to find each appellant guilty.

The learned judge agreed with their opinions and accordingly convicted both appellants and sentenced each of them to death.

One of the grounds of appeal is this. It is argued that the learned judge should also have ascertained from each assessor the reasons for his opinion, that these reasons should be recorded and that the admitted failure of the learned judge to do so vitiated the trial.

The relevant provisions of the Criminal Procedure Code dealing with the conclusion of a trial before a judge with the aid of assessors are to be found in sections 197 and 198. Until 1954 they read as follows:—

"197. When the case for the defence and the reply (if any) of the officer conducting the prosecution are concluded, the court may sum up the evidence for the prosecution and defence and shall require each of the assessors to state his opinion orally and shall record such opinion.

198. (i) If the court agrees with the opinion of both assessors, or, where the assessors are of different opinions, with the opinion of one assessor, the court shall give judgment accordingly.

(ii) If the court is unable to agree with the opinion of both assessors, or of the one remaining assessor as provided by Section 188, the proceedings shall be stayed and a new trial held with the aid of fresh assessors."

In 1954 these two provisions were amended by Ordinance No. 8 of 1954 to read as follows:—

"197. When the case for the defence and the reply (if any) of the officer conducting the prosecution are concluded, the court may sum up the evidence for the prosecution and the defence and shall ascertain from each of the assessors his opinion, *and his reason therefor*, on such particular issues of fact relevant to the charge as the court may specify. All such opinions and *reasons shall be recorded.*

198. After having recorded and considered the opinions of the assessors, the court shall give judgment but in so doing shall not be bound to conform to the opinions of the assessors or either of them, provided that the court shall record its reasons for dissenting therefrom."

Both under the old and new provisions, assessors merely aid the judge. There is "a sharp distinction between a trial by jury and a trial with the aid of assessors. A jury, aided by the judge, is the final tribunal for deciding the facts; assessors merely aid the judge, who decides the facts as well as the law." This was so stated at page 181 by Sir John Beaumont when giving the advice of the Privy Council in *Ramanugrah Singh v. King-Emperor.*[1]

The difference between the old and new provisions that is material to this appeal is that under the old provision the judge need only ascertain from each assessor his opinion on the case and that the judge shall record such opinion, whereas under the new provision he is also required to ascertain from the assessors *reasons* for their opinion and to *record* such reasons. The judge shall give judgment only after having recorded and considered the opinions of the assessors (though he need not conform to their opinions), but the new section 198 does not, however, specifically require the judge to consider the *reasons* for the assessors' opinions.

It is argued that the failure of the learned judge to ascertain from each assessor the reasons for his opinion and to record them has occasioned a failure of justice within the meaning of section 422. Dato' Seenivasagam for the first appellant, amplifies this argument by saying that the enactment of the additional requirement as regards reasons by the legislature in 1954 must have been deliberate, in order to require the judge to form his judgment based not only on the assessors' bare opinions but also on their reasons. In this particular case, it is argued that, if the assessors had been asked for and had given their reasons, the learned judge with these reasons in mind might have come to a different conclusion and the absence of these reasons had worked an injustice on the appellants.

We agree that the omission of the learned judge has occasioned a failure of justice and that this omission has vitiated the proceedings.

In an Indian case *Abdul Rahman v. King-Emperor*[2] the appellant was convicted by a district magistrate on a charge of abetment of forgery. At the trial the depositions of witnesses were read over to them while the case otherwise proceeded and those of some witnesses were handed to them to read to themselves. The Code of Criminal Procedure provides by section 360 that the deposition of each witness shall be read over to him in the presence of the accused or his pleader. The High Court confirmed the conviction, holding that the course pursued was merely an irregularity within section 537 of the Code, and that as no failure of justice had been occasioned, that section saved the conviction from being vitiated. On appeal

to the Privy Council, the conviction was upheld as there had been no actual or possible failure of justice whether the sections of the Code had or had not been properly applied.

Lord Phillimore in delivering the advice of their Lordships said at page 110:—

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships' view may be supported by the curative provisions of sections 535 and 537."

It appears to us, however, that the omission in the instant appeal is more serious and is more akin to failure to comply with section 164 (i) which provides that a person may only be tried for three offences of the same kind if committed within a period of twelve months. In another Indian case *N.A. Subramania Iyer v. King-Emperor*[3] the Lord Chancellor, giving the advice of the Privy Council, said at page 263:—

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity.

The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

We now cite a case in pre independence India which held, and we think rightly, that the failure of a sessions judge to record the opinions of assessors vitiated the proceedings. That case is *Lal Behari Singh and Others v. Emperor.*[4] In India then section 309(i) of the Criminal Procedure Code read:—

"The court [of Session] shall require each of the assessors to state his opinion orally on all the charges on which the accused has been tried and shall record such opinion and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and answers to them shall be recorded."

In *Lal Behari Singh's* case the court said at page 358:—

"In [*Subramania Iyer v. King-Emperor*],[3] their Lordships of the Privy Council held that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537, Criminal Procedure Code. The learned sessions judge was bound to record the opinion of each assessor in respect of all charges on which the accused were being tried, and his failure to do so merely means that he had virtually tried the case without the aid of assessors, and such a trial before a court of session is void in toto because under section 268, Criminal Procedure Code, all trials before a Court of Session have to be either by jury or with the aid of assessors."

We now cite a post-independence decision of the Indian Supreme Court, *Prem Nath v. State of Delhi.*[5] There the appellant was tried on five charges including two charges of murder. The opinion of the assessors, however, was taken only on the charges of murder but not in respect of the other three charges. The Indian Supreme Court set aside the conviction and sentence of the appellant and ordered a retrial. Jagannadhadas J., delivering the judgment of the court, said at page 7:—

"It is to be seen from the various relevant provisions that a trial with the aid of assessors differs from a trial by jury in two fundamental respects. The assessors are to give only their individual opinions and the judge is not bound to conform to them, while the jury gives its combined verdict either unanimously or by a majority through its foreman and the judge has no power to ask for the opinions of the individual jurors.

In substance it may be said that the jury forms part of the court which tries the accused while the assessors only aid the court in its trial of the accused. This distinction appears to be clearly brought out by the very language used in section 268, Criminal Procedure Code.

Notwithstanding this fundamental difference it cannot be doubted that the participation of the assessors in the trial as prescribed by law, is an essential feature of the trial in Courts of Session for certain offences, and that a trial in violation of the substance of the procedure so prescribed is an illegal trial."

The above decisions deal with the failure of the judge to record the opinion of the assessors. We are of the view that by virtue of the language used in the new section 197, just as the learned judge should have ascertained from each assessor his opinion, as he in fact did, equally he should also have ascertained from each assessor the reasons for his opinion. We agree with Dato' Seenivasagam that these reasons might have influenced the learned judge's judgment, though he was not obliged to conform to the assessors' opinions, and the omission by him to ascertain these reasons has occasioned a failure of justice within the meaning of section 422 and therefore vitiated the trial.

In the circumstances we set aside the conviction and sentences and order a retrial of the first and third appellants.

As regards the second appellant, he pleaded guilty and appeals only against the sentence of whipping imposed on him. In view of the brutality of the crime committed, we do not think that there is any merit in his appeal and we dismiss it.

Retrial of 1st and 3rd appellants ordered.

2nd appellant's appeal dismissed.

Solicitors: *R. Rajasingam & Co.; Tan Phock Kin.*